

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON**

DIAHNTAE BELL,

WARDEN, Warren Correctional
Institution,

Respondent.

REPORT AND RECOMMENDATIONS ON MOTION FOR RELIEF FROM JUDGMENT

This is a habeas corpus case brought *pro se* pursuant to 28 U.S.C. § 2254. Upon initial review under Rule 4 of the Rules Governing § 2254 Cases, the Magistrate Judge recommended that the Petition be dismissed with prejudice as barred by the statute of limitations (Doc. No. 4). Petitioner objected (Doc. No. 5), but Judge Black adopted the Report over those Objections and dismissed the case (Doc. Nos. 6, 7).

The Magistrate Judge had recommended dismissal because, although applications to proceed *in forma pauperis* had been received, the Clerk had received no actual habeas petition, as reflected in letters from the Clerk to Petitioner dated January 31, 2011, and February 11, 2011 (See R&R, Doc. No. 4, PageID 58). Petitioner has now moved for relief from judgment or for reconsideration and has provided the Court with a letter from the Clerk dated between these two dates on February 2, 2011(Doc. No. 9). That letter indicates “[w]e will keep your Writ for Habeas Corpus on file until

we receive your IFP.” *Id.* Attachment 1.¹

Despite a diligent search, the Clerk’s Office personnel cannot locate the petition which was the subject of this letter. Nevertheless, the letter constitutes an acknowledgement that the Clerk had received both a petition and an application for proceed *in forma pauperis* not later than February 2, 2011, two weeks before the statute of limitations expired.

Therefore, pursuant to Fed. R. Civ. P. 60(a), it is respectfully recommended that the Motion for Relief be granted, the judgment be reopened, and the Court proceed with further analysis under Rule 4 of the Habeas Rules.

No notice of right to object is appended as Respondent has not yet been ordered to answer and this Report recommends granting the relief Petitioner requests.

June 20, 2011.

s/ **Michael R. Merz**
United States Magistrate Judge

¹ The Magistrate Judge became aware of this letter only when it was attached to the instant Motion. Petitioner concedes in the Motion that he had not sent it before.